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In the Supreme Court of the United States

OCTOBER TERM,
1905.

C. E. HOWARD, Appellant, vs. E. B. PERRIN, Appellee.	No. 110

Appeal from the Supreme Court of the Territory of Arizona.

APPELLEE'S BRIEF.

The four points raised in appellant's brief constitute in fact but one and will for convenience be herein referred to in the same order.

Appellee's Evidence of Title.

I.

It is both stipulated and proven by uncontradicted evidence that prior to the commencement of this action the land in question was part of an odd numbered section within the place limits of the Atlantic & Pacific Railroad's land grant, that the land had been duly surveyed, the survey accepted, the road constructed, and everything necessary, done, in order to vest the title in the railroad company, provided the tracts were not within the exceptions of the grant, and that the railroad company had conveyed the same to the plaintiff by a good and sufficient warranty deed. The land was selected, and duly certified by the register and receiver of the local land office to be of the character included in the grant, and not embraced within any of the exceptions. No contest was made by anyone; their approval, was in accordance with the rules and regulations of the land department duly forwarded to, and filed in the general land office at Washington, became a proper record of that office, consequently a proper document to be received by the Court as *prima facie* evidence of its recitals when certified to by the commissioner and under the doctrine declared by this Court in *Deseret Salt Co. vs. Tarpey, 142 U. S. 24*, was ample proof of title in the plaintiff to maintain ejectment against one who by his pleading is an avowed trespasser. We submit that the finding of the Supreme

Court of Arizona, based upon this *prima facie* and uncontradicted evidence, that the plaintiff was the owner of the land in question, is conclusive.

It is obvious that the decisions of this Court regarding lieu land selections, under the Forest Reserve act, are in no way pertinent.

II.

The Statute of Limitations.

The Arizona statute of limitations provides:

"2935. (SECTION 1.) Every suit to be instituted to recover real property as against "any person in peaceable and adverse possession thereof under title or color of title, shall "be instituted within three years next after "the cause of action shall have accrued and "not afterward.

"2936. (SEC. 2.) By the term "title" as "used in the preceding section, is meant a "regular chain of transfer from or under the "sovereignty of the soil, and by "color of title" "is meant a consecutive chain of such transfer "down to such person in possession without "being regular, as if one or more of the memorials or muniments be not recorded, or not "duly recorded or be only in writing, or such

"like defect as may not extend to or include "the want of the intrinsic fairness and honesty, "or when the party in possession shall hold the "same by a land warrant or land scrip, with a "chain of transfer down to him in possession.

"2937. (SEC. 3.) Every suit instituted to "recover real property as against any person "having peaceable and adverse possession "thereof, cultivating, using, or enjoying the "same, and paying taxes thereon, if any, and "claiming under a deed or deeds duly recorded, "shall be instituted within five years next after "the cause of action shall have accrued, and "not afterwards: *Provided*, That this action "shall not apply to any one in possession of "land, who in the absence of this section would "deraign title through a forged deed: *Pro-* "*vided, further*, That no one claiming under a "forged deed, or a deed executed under a "forged power of attorney, shall be allowed "the benefits of this section.

"2938. (SEC. 4.) Any person who has a "right of action for recovery of any lands, tene- "ments or hereditaments against another hav- "ing peaceable and adverse possession thereof, "cultivating, using and enjoying the same, "shall institute his suit therefor within ten "years next after his cause of action shall have "accrued, and not afterward.

"2939. (SEC. 5.) The peaceable and adverse possession contemplated in this preceding section as against the person having right of action, shall be construed to embrace not more than one hundred and sixty acres, including the improvements or the number of acres actually enclosed, should the same be less than one hundred and sixty acres; but when such possession is taken and held under some written memorandum of title, other than a deed, which fixes the boundaries of the possessor's claim and is duly recorded, such peaceable possession shall be construed to be co-extensive with the boundaries specified in such instrument.

"2941. (SEC. 7.) In all cases when the party in possession claims real property by right of possession only suits to recover the possession from him shall be brought in two years after the right of action accrues and not afterwards, and in such case the defendant is not required to show title or color of title from and under the sovereignty of the soil as provided in the preceding section as against the plaintiff who shows no better right."

The appellant attempts to bring himself within the terms of the last paragraph, but that paragraph is only applicable to the possession of trespassers. A trespasser in possession may

plead it against another trespasser, but a previous paragraph gives to one having a mere right of possession ten years in which to institute his action against mere trespassers. The possessory right of one who intends in good faith to acquire title under the public land laws is a right which may be enforced by the Courts against a trespasser, but the appellant is by his plea a mere trespasser who makes no claim of any intention to acquire title under the public land laws. By the terms of the Statute this plea is only applicable against one who shows no better right.

Were the provisions of the paragraph in question less clear, it would be absurd to assume that the legislature intended to favor a mere trespasser over one in possession under color of title. Three years is required to protect the latter possession, five years to protect the possession of one holding under a recorded deed and paying taxes, and ten years to protect the possession of an intruder cultivating and enjoying the property against a person entitled to the possession.

III.

Appellant's Alleged Water Right.

The Supreme Court of Arizona makes the following findings of fact:

"That the only water upon said land is per-

"colating water oozing through the soil be-
"neath the surface in an undefined and un-
"known channel.

"That neither the said C. E. Howard,
"appellant, nor his said grantor have ever di-
"verted any of said water from said land or
"used or caused the same to be used elsewhere
"by any person whomsoever."

These findings being conclusive of the matters covered by them, appellant is driven to assume the position, that by going upon land which was not a part of the public lands and there developing and using water percolating through the soil he gained a right to the use of the water and an easement in the land itself to the extent of its use for the watering of his stock thereon, that being practically the only use to which the land was adapted.

Water Must be that of a Running Stream to be the Subject of Appropriation in this Territory.

Congress has expressly recognized and confirmed appropriations of water upon the public lands when "the same are recognized and acknowledged by the local customs, laws and decisions of courts." In this case no evidence was introduced respecting any custom concerning the

appropriation of water. No custom has ever existed in this territory whereby the appropriation of water, other than that of running streams, has been acknowledged or recognized; there is no decision of our courts recognizing the right to make such appropriations, and what may be the subject of appropriation in this territory is purely a matter of statutory enactment.

In the Compiled Laws of Arizona in 1877 it is provided:

"3240. (SECTION 1.) All rivers, creeks and "streams of running water in the Territory of "Arizona are hereby declared public, and ap- "plicable to the purposes of irrigation and "mining, as hereinafter provided. * * *

"3242. (SEC. 3.) All the inhabitants of "this territory who own or possess arable and "irrigable lands, shall have the right to con- "struct public or private acequias, and obtain "the necessary water for the same from any "convenient river, creek or stream of running "water."

These provisions have been re-enacted in the several subsequent Revised Statutes of the Territory, and constitute the only legislation upon the subject of water appropriation save that regarding flood waters.

With the exception of the California case cited in appellant's brief the customs, legislation and

decisions, in all the Pacific coast states and territories have been uniform to the effect that percolating waters are the property of the owner of the soil, and that case is in conflict with the long established rule prevailing in California. To entitle one to appropriate water of the character authorized by the Statute the appropriator must be the owner or possessor of arable and irrigable land.

Slosser vs. Salt River Valley Canal Co., 65 *Pac.* 332. (*Arizona*).

The appellant in his pleading alleges that he is in possession of the land in question, but does not allege that it is arable or irrigable land, and does not allege that he is the owner or possessor of any such land.

All Our Legislation Respecting the Appropriation of Water is Applicable Only to Public Land of the United States.

Willow Creek Irrigation Co. vs. Michaelson, 60 *Pac.* 943. (*Utah*).

In Benton vs. Johnson, 17 Wash. 277; 61 Am. St. Rep. 913, the Supreme Court of Washington says:

"Moreover the doctrine of appropriation ap-
"plies only to public lands, and when such
"lands cease to be public and become private
"property, it is no longer applicable: Gould
"on Waters, Sec. 240; Pomeroy on Riparian
"Rights, Sec. 30; Curtis vs. La Grande Water
"Co., 20 Or. 34. It was for the purpose of
"protecting the rights of appropriators of water
"for beneficial uses on the public lands which
"had vested and accrued, by virtue of local
"customs, laws and decisions of the courts,
"that the ninth section of the Act of Congress
"of July 26, 1866, the substance of which is
"included in Section 2339 of the Revised
"Statutes, was enacted. It was apparent to
"Congress, and indeed to everyone, that
"neither local customs nor state laws, or de-
"cisions of state courts, could vest the title to
"public land or water in private individuals
"without the sanction of the owner, viz., the
"United States. The government, being the
"sole proprietor, had the right to permit the
"water to be taken and diverted from its ripar-
"ian lands, but when it disposed of land with-
"out reserving the water the latter passed to
"its grantee free from interference thereafter
"by the grantor.

"The object of the section (Rev. Stats. Sec.
"2339) was to give the sanction of the United
"States, the proprietor of the lands, to posses-
"sory rights, which had previously rested

"solely upon the local customs, laws and deci-
"sions of the courts, and to prevent such
"rights from being lost on a sale of the lands."

Jennison vs. Kirk, 98, *U. S.* 456-457.

Public lands are such as are subject to sale or other disposition by the United States, under general laws, and the term does not include lands which have been reserved or withdrawn from the operation of the general land laws.

Newhall vs. Sanger, 92 *U. S.* 761-766
Co. Op. Ed., Book 23, *Page* 769.

The Act by which Congress granted the land to plaintiff's grantor provides:

"SEC. 6. And be it further enacted, that
"the President of the United States shall
"cause the lands to be surveyed for forty miles
"in width on both sides of the entire line of
"said road, after the general route shall be
"fixed, and as fast as may be required by the
"construction of said railroad; and the odd
"sections of land hereby granted shall not be
"liable to sale, or entry, or pre-emption, be-
"fore or after they are surveyed, except by
"said company, as provided in this act."

The land in question was therefore no more public land at the date of appellant's entry than it is now. His original entry being a trespass,

he could neither originate nor acquire any right under it.

We submit that it is obvious from the record that appellant is prosecuting a frivolous appeal purely for the purpose of retaining possession of valuable property pending protracted litigation upon the chance that a jury will assess the rental value of the premises at a less amount than the value of its use to the appellant.

Respectfully submitted,

EDWARD M. DOE,

Attorney for Appellee.